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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT J. TAYLOR, Trustee,

Petitioner,

v.

FREELAND & KRONZ, a Partnership; WENDELL G. FREELAND; and RICHARD F. KRONZ,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 2

I. CONTRARY TO THE ARGUMENTS OF RESPONDENTS AND AMICI, SECTION 522(*l*) MUST BE CONSTRUED IN LIGHT OF SECTION 105(a) 2

II. THE VARIOUS POLICY ARGUMENTS MADE BY RESPONDENTS AND AMICI ARE WITHOUT MERIT 8

III. DAVIS HAD NO COLORABLE STATUTORY BASIS FOR CLAIMING THE ENTIRE PROCEEDS OF THE TWA LAWSUIT AS EXEMPT 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

In re Alderson, 114 Bankr. 672 (Bankr. D. S.D. 1990) 7

In re Bayou Self, Inc., 73 Bankr. 682 (Bankr. W.D. La. 1987) 3

Burlington Northern R.R. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.), 853 F.2d 700 (9th Cir. 1988) 10

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 111 S. Ct. 922 (1991) 7

Cooter & Gell v. Hartmarx Corp., 110 S. Ct. 2447 (1990) 5

Gibbons v. Haddad (In re Haddad), 68 Bankr. 944 (Bankr. D. Mass. 1987) 4

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827 (1990) 5

Lancaster v. Tennessee (In re Wall Tube & Metal Prods. Co. v. Lancaster), 831 F.2d 118 (6th Cir. 1987) 10

In re Muscatell, 116 Bankr. 295 (Bankr. M.D. Fla. 1990) 7

In re Pretzer, 96 Bankr. 790 (Bankr. N.D. Ohio), *affirmed*, 1989 U.S. Dist. LEXIS 15146 (N.D. Ohio 1989) 4

United States Trustee v. Prines, (In re Prines), 867 F.2d 478 (8th Cir. 1989) 4

Vance v. Terrazas, 444 U.S. 252 (1980) 3

Zidell, Inc. v. Forsch (In re Coastal Alaska Airlines, Inc.), 920 F.2d 1428 (9th Cir. 1990) 6

FEDERAL STATUTES

Bankruptcy Code, 11 U.S. C. § 101 *et seq.* (1988)

11 U.S.C. § 105 ..... 3, 5, 6, 7
11 U.S.C. § 503(b) 10
11 U.S.C. § 522(d) 11, 12
11 U.S.C. § 522(*l*) ..... *passim*
11 U.S.C. § 727(a)(4)(B) 8
11 U.S.C. § 1127 11
11 U.S.C. § 1329 11

18 U.S.C. § 152 (1988) 8

18 U.S.C. § 1621(2) (1988) 8

FEDERAL RULES

Federal Rules of Bankruptcy Procedure

Rule 3002(c) 2, 6
Rule 4003(b) 2, 3, 7, 9
Rule 9006(b)(3) 2
Rule 9011(a) 7

Fed. R. Civ. P. 11 ..... 5, 7

LEGISLATIVE HISTORY

H.R. Rep. No. 595, 95th Cong.,
1st Sess. (1977) 11

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REPLY BRIEF FOR PETITIONER

ARGUMENT

I. CONTRARY TO THE ARGUMENTS OF RESPONDENTS AND AMICI, SECTION 522(*l*) MUST BE CONSTRUED IN LIGHT OF SECTION 105(a)

Both respondents and amici have argued that the language of Section 522(*l*), in conjunction with Bankruptcy Rules 4003(b) and 9006(b)(3), is "clear" and "unambiguous" in providing that unless either the trustee or the creditors file an objection to a claimed exemption within the prescribed thirty-day period, the claimed exemption must be allowed. Resp. Br. 17-21, 24-26; Am. Br. 5-19.[1] However, as Taylor pointed out in his first brief on the merits, Section 522(*l*) must be construed in accordance with Section 105(a), which specifies that "[n]o provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate . . . to prevent an abuse of process." Therefore, as a number of lower courts have held, bankruptcy courts have the power to disallow frivolous exemption claims even when no one has objected to such claims within the period prescribed by Bankruptcy Rule 4003(b). Pet. Br. 27. Recognizing the effect of Section 105(a), respondents and amici have attempted to show that it is not applicable to this case, but their arguments lack merit.

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[1]As respondents concede, the legislative history of Section 522(*l*) is "limited" and merely "paraphrase[s]" the language of the statute. Resp. Br. 22-23.

1. Respondents first argue that this Court "could decline to consider petitioner's '§ 105(a) argument' as it was not raised below and was not raised in the Petition for Certiorari." Resp. Br. 32-33. However, by referring to Section 105(a) in his brief on the merits, Taylor was not making a new "argument," but simply citing additional legal support for an argument which both the bankruptcy court and district court relied upon below: that, even though Taylor did not formally object to the claimed exemption within the thirty-day period prescribed by Bankruptcy Rule 4003(b), Section 522(*l*) did not require the bankruptcy court to allow the exemption when there was no colorable statutory basis for it. Pet. App. 24a, 38a. There is no reason for this Court to disregard a relevant statutory provision that bears on the construction of Section 522(*l*) simply because it was not argued in the lower courts.[2]

2. Respondents have also argued that the 1986 amendment to Section 105(a), which added what is currently the second sentence of that provision, "was too late to apply" to Davis' exemption claim. Resp. Br. 33-35. However, that argument fails on two grounds. First, the amendment to Section 105(a) was merely a clarification of what the provision had always meant since its enactment in 1978. *See In re Bayou Self, Inc.*, 73 Bankr. 682, 683 (Bankr. W.D. La. 1987) ("The amendment to Section 105 was a clarification or

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[2]Even if Taylor's citation of Section 105(a) were considered to be a new "argument," Section 105(a) is "essential . . . to an intelligent resolution" of what Congress intended Section 522(*l*) to mean, and should therefore be considered by this Court. *Vance v. Terrazas*, 444 U.S. 252, 285 n.5 (1980).

codification of prior law, not a change in that law"); *In re Pretzer*, 96 Bankr. 790, 793 (Bankr. N.D. Ohio), *affirmed*, 1989 U.S. Dist. LEXIS 15146 (N.D. Ohio 1989) (noting that the amendment "clarified the Court's 'sua sponte' powers").[3] Second, even if the amendment were deemed to have altered the meaning of Section 105(a), the amending statute (the Bankruptcy Act of 1986) clearly provides that the amendment will take effect no later than 270 days after the effective date of the Act (November 26, 1986) and will apply to cases still pending at that time. Pet. Br. 25.[4] Thus, even if applying the amendment to this case would somehow amount to "retroactive" application of the amendment, as

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[3]Despite respondents' complaint that the bankruptcy court in this case did not act "sua sponte" (Resp. Br. 34-35), it is clear that when bankruptcy courts have the power to act "sua sponte" under Section 105(a), "they certainly can act, as here, upon the motion of a party." *Gibbons v. Haddad (In re Haddad)*, 68 Bankr. 944, 948 (Bankr. D. Mass. 1987).

[4]*See also United States Trustee v. Prines (In re Prines)*, 867 F.2d 478, 482 (8th Cir. 1989) ("Subsection [302](d)(1) [of the 1986 Act] provides that the Act's trustee provisions [including Section 105(a)] do not become effective or apply to pending cases . . . until two hundred seventy days after the Act's general effective date or thirty days after the Attorney General certifies the district, whichever comes first"). Moreover, while Subsection 302(d)(1) of the 1986 Act provides that certain amendments (including the amendment to Section 105) will apply to pending cases, Subsection 302(c)(1) of the same Act provides that a number of *other* amendments made by the Act "shall not apply with respect to cases commenced under Title 11 of the United States Code before the effective date of the Act." Thus, Congress made a clear distinction between those amendments which were only prospective in effect and those (including the amendment to Section 105(a)) which were also to be applied retroactively.

respondents claim, Congress has clearly prescribed that the amendment be applied in that manner and this Court should give effect to Congress' intentions. *See Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990) ("where the congressional intent is clear, it governs").

3. In addition to arguing that this Court should simply ignore Section 105(a), respondents (and amici) argue that it is not an "abuse of process," within the meaning of Section 105(a), to make exemption claims for which there is no colorable statutory basis. Resp. Br. 36-37, Am. Br. 35-36. Amici argue, in particular, that "abuse of process" always "require[s] some element of malice." Am. Br. 36. But both respondents and amici are conspicuously silent about the fact that this Court, in *Cooter & Gell v. Hartmarx Corp.*, 110 S.Ct. 2447, 2456 (1990), recognized that the filing of papers which violate the (objective reasonableness) standard of Fed. R. Civ. P. 11 is an "abus[e of] the judicial process." Pet. Br. 26. Nor have they acknowledged the fact that, as Taylor pointed out in his initial brief on the merits, a number of lower federal courts have held that Section 105(a) permits bankruptcy courts to disallow frivolous exemption claims even in the absence of a timely objection. Pet. Br. 27. There is simply no reason to assume that Congress used the term "abuse of process" in the narrow fashion urged by the respondents and amici.

4. Amici also mischaracterize Taylor's position by contending that he views Section 105(a) as a broad authorization "to do equity in derogation of other provisions of the Code and Rules." Am. Br. 33. However, Taylor has never made any such claim.

Section 105(a) merely makes clear that with respect to *some* provisions of the Code (those which "provid[e] for the raising of an issue by a party in interest"), the bankruptcy court has the power to act, even if the parties in interest have not raised the issue in a timely fashion, when (and *only* when) such action by the court is "necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." The cases cited by amici are not apposite,[5] and they fail to acknowledge the truly apposite cases, cited by Taylor, in which courts used Section 105(a) to disallow frivolous exemption claims. Pet. Br. 27.[6]

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[5]The only case cited by amici which deals with the bankruptcy court's power to act under Section 105, when parties have not raised issues in a timely fashion, is *Zidell, Inc. v. Forsch (In re Coastal Alaska Lines, Inc.)*, 920 F.2d 1428 (9th Cir. 1990), and that case is not on point. In *In re Coastal Alaska Lines*, the Ninth Circuit held that Section 105(a) does not authorize bankruptcy courts to enlarge the time for filing a proof of claim under Bankruptcy rule 3002(c). But the creditor whose late claim was disallowed apparently did not assert, nor did the Ninth Circuit find, that allowance of his claim was necessary in order "to enforce or implement court orders or rules" or to prevent any party to the proceeding from successfully committing an "abuse of process." 920 F.2d at 1431-33.

[6]Respondents also make the surprising argument that "[i]f Congress wanted to modify the objection procedure to remedy an alleged evil they saw in it, they would have undoubtedly amended § 522(*l*) of the Code when they amended § 105(a)." Resp. Br. 37. But clearly there was no need to amend *both* statutes. It was obviously more economical for Congress to pass a clarifying amendment to Section 105(a), which refers not only to Section 522(*l*), but also to other provisions of the Code which "provid[e] for the raising of an issue by a party in interest . . . ."

5. Finally, respondents and amici have argued that even if Section 522(*l*), as construed in light of Section 105(a), does not permit bankruptcy courts to disallow frivolous exemption claims when no objection has been made within the period required by Bankruptcy Rule 4003(b), there are other available sanctions which will discourage debtors from making frivolous exemption claims. Resp. Br. 27-31, Am. Br. 42-45. But even if that argument were correct, it would not be any reason to ignore the effect of Section 105(a). And, in fact, that argument is *not* correct. Bankruptcy Rule 9011(a) is not an available sanction in cases of this sort.[7] The other sanctions identified by respondents and amici would at most be available to punish deliberate misrepresentations, and would not be applicable in cases where

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[7]It is clear that under Rule 9011(a), "schedules . . . are excepted from the papers that must be signed by the debtor's attorney" and that "[t]hus, sanctions may not lie against an attorney for transgressions surrounding these documents." *In re Alderson*, 114 Bankr. 672, 677 (Bankr. D. S.D. 1990). *See also In re Muscatell*, 116 Bankr. 295, 298 (Bankr. M.D. Fla. 1990) (even if attorney had improperly advised debtor not to disclose certain properties on the schedule of assets, the attorney could not be sanctioned for such conduct under Rule 9011(a) because he did not sign the schedules). It is incongruous to assert, as respondents and amici do, that a debtor, like Davis, who was represented by counsel, could be sanctioned under Rule 9011(a) for making a legally improper claim when her attorney would not be subject to such sanctions. While represented parties are subject to the requirements of Fed. R. Civ. P. 11, *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 111 S.Ct. 922, 929-931 (1991), Fed. R. Civ. P. 11 (unlike Bankruptcy Rule 9011) requires attorneys for represented parties to sign *all* papers, and thus subjects the attorney to sanctions for any legally groundless pleading. It is one thing to make both the attorney and his client liable for filing a legally groundless document, and quite another to make only the client liable.

frivolous exemption claims were merely the result of carelessness.[8] Consequently, they would not require debtors (or their counsel) to make a reasonable inquiry into the validity of exemptions before claiming them, and would leave many "abuses of process" (in the form of unreasonable claims) unredressed.

II. THE VARIOUS POLICY ARGUMENTS MADE BY RESPONDENTS AND AMICI ARE WITHOUT MERIT

Both respondents and amici have argued that, as a matter of "policy," adopting Taylor's interpretation of Section 522(*l*) would have various adverse effects upon the operation of the bankruptcy system. Resp. Br. 23-24, 29, 31-32; Am. Br. 28-29, 46-54. However, the arguments made by respondents and amici are without merit.

1. Respondents and amici argue that one purpose of the Code is to provide the debtor with a "fresh start" and that this goal would be frustrated unless debtors can be sure, once no one has objected to a claimed exemption within the period prescribed by

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[8]As respondents and amici point out, both 11 U.S.C. § 727(a)(4)(B) (1988), which permits bankruptcy courts to deny the debtor a discharge under certain circumstances and 18 U.S.C. § 152 (1988), which defines bankruptcy crimes, apply only to "knowing[] and fraudulent[]" misconduct. Resp. Br. 31; Am. Br. 44-45. Similarly, one is only guilty of "perjury" under 18 U.S.C. § 1621 if he or she "willfully subscribes as true any material matter which he does not believe to be true." 18 U.S.C. § 1621(2) (1988). And the various professional codes cited by amici (Am. Br. 43 n.13) prohibit only "knowing" misconduct.

Bankruptcy Rule 4003(b), that the exemption will be allowed. Resp. Br. 23-24, 39; Am. Br. 46-51. But under the interpretation of Section 522(*l*) urged by Taylor, debtors would be deprived of that security only if they had made a frivolous exemption claim. Pet. Br. 23-24. Even if the bankruptcy court believed that the debtor was not entitled to the exemption, it could not disallow the exemption if the propriety of the exemption were reasonably disputable. *Id.* Surely the objective of a "fresh start" is not harmed by requiring the debtor to have *some* reasonable basis for the exemptions that he or she claims. Nor is there any reason to believe that Congress intended debtors to have a "fresh start" at all costs and without any regard at all to the propriety of their own conduct in the bankruptcy court.[9]

2. Respondents and amici also argue that if this Court adopts Taylor's position, trustees will be able to exploit unwary debtors by deliberately failing to object to groundless exemption claims, letting the debtor incur all of the expenses that the trustee should have borne (e.g., the expense of prosecuting a pending lawsuit), and then objecting to the claimed exemption only after the debtor's work has produced a valuable result (such as the settlement in this case). Am. Br. 28-29; Resp. Br. 31-32.[10] However, in such a case, those whose work preserved (or actually enhanced) the estate would be

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[9]The same considerations apply to amici's contention that Taylor's interpretation of Section 522(*l*) would hinder "the just, speedy and inexpensive determination of every case and proceeding." Am. Br. 51-53.

[10]Amici do concede, however, that there is no evidence of any such motive on Taylor's part. Am. Br. 31 n.8.

entitled to assert an administrative priority claim, against the estate, under 11 U.S.C. § 503(b).[11] *See, e.g., Burlington Northern R. R. v. Dant & Russell, Inc. (In re Dant & Russell, Inc.)*, 853 F.2d 700, 709 (9th Cir. 1988) ("When a claimant expends funds [post-petition] that preserve the estate, treatment as an administrative expense is authorized by the Bankruptcy Code"); *Lancaster v. Tennessee (In re Wall Tube & Metal Products Co. v. Lancaster)*, 831 F.2d 118, 124 (6th Cir. 1987) (state entitled to administrative expense priority for its response costs from the debtor's estate under CERCLA). Accordingly, the trustee would have nothing to gain (and much to lose[12]) by withholding a valid objection to the claimed exemption.

3. Finally, amici argue that if this Court were to adopt Taylor's position, the result would "have profound negative impact on the administration of

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[11]Section 503(b) provides, in pertinent part, that:

> After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including --
>
> (1)(A) the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case . . . .

11 U.S.C. § 503(b) (1988).

[12]The court might find, contrary to the trustee's belief, that the claimed exemption was incorrect but not wholly frivolous. In that case, the trustee would simply have forfeited a meritorious objection to the claimed exemption.

reorganization cases." Am. Br. 53-54. Specifically, amici contend that under Chapters 11 and 13 of the Code, a plan may not be confirmed unless creditors are receiving at least what they would receive if the estate were liquidated (the so-called "best interest of creditors" test). Am. Br. 53. Thus, amici appear to be arguing, plans could not be confirmed if there was a possibility that exemptions might later be disallowed (thus increasing the size of the estate and the amount to which creditors would be entitled in the event of a liquidation). But the Code does not prevent bankruptcy courts from confirming a plan simply because something may happen, after confirmation of the plan, that will increase the size of the estate. Indeed, Congress has specifically provided, under both Chapter 11 and Chapter 13 of the Code, that plans may be modified after they are confirmed.[13]

III. DAVIS HAD NO COLORABLE STATUTORY BASIS FOR CLAIMING THE ENTIRE PROCEEDS OF THE TWA LAWSUIT AS EXEMPT

In his initial brief on the merits, Taylor pointed out that when Davis filed her bankruptcy petition, she could not reasonably have believed that the entire proceeds of the TWA lawsuit were exempt under Section 522(d).

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[13] 11 U.S.C. § 1127(b) (1988) allows modification of a Chapter 11 plan "at any time after confirmation . . . and before substantial consummation of such plan . . . ." And 11 U.S.C. § 1329 (1988) allows modification of a Chapter 13 plan at "any time after confirmation of the plan but before the completion of payments under such plan . . . ." "[T]he application of the liquidation value test must [simply] be redetermined at the time of the confirmation of the modified plan." H.R. Rep. No. 595, 95th Cong., 1st Sess. 431 (1977).

She knew that a large portion (if not all) of any recovery would be for "back pay" and/or "tort claims," both of which are clearly *not* exempt under Section 522(d). Respondents do not contend otherwise.

1. At the time that Davis filed her bankruptcy petition, the Pittsburgh Human Relations Commission ("the Commission") had awarded her an unspecified amount of damages for "back pay." Pet. Br. 30-31. Respondents do not dispute that the only exemption available, under Section 522(d), for this "back pay" award would be a "catch-all" exemption, under Section 522(d)(5), in the amount of $3,950. Thus, even if one were to accept respondents' contention that the value of the TWA lawsuit was only $5,000 or $10,000 at the time that Davis filed her bankruptcy petition (Resp. Br. 46-47), Davis would not have been entitled to exempt the entire amount.

2. In fact, as the bankruptcy court found, the value of the TWA lawsuit on October 24, 1984 (the date on which Davis filed her bankruptcy petition) was $110,000. Pet. App. 40a.[14] Respondents now argue at length that when either Davis or her bankruptcy attorney stated, at the creditors' meeting held on January 4, 1985, that there was a "possible claim [of] $90,000" in the TWA lawsuit, they were not actually *valuing* the suit at $90,000. Resp. Br. 41-42. But respondents fail to discuss the fact that, only five days later, on January 9, 1985, John A. Meyer, an associate of Freeland and Kronz who was representing Davis in the TWA lawsuit,

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[14]Neither the district court nor the court of appeals addressed the valuation issue. Pet. App. 15a, 25a.

wrote a letter to Taylor in which he valued the case at "approximately $110,000."[15] Of that $110,000, it is clear that Davis and her attorneys viewed at least $70,000 as being for "back pay."[16] Davis could not reasonably have believed, when she filed her petition, that the entire amount would be exempt under Section 522(d).

3. Even if one were to assume that when Davis filed her bankruptcy petition, she envisioned the settlement which ultimately was reached in 1987, she would have had no colorable grounds under Section 522(d) for exempting the $23,483.75 that was characterized in the settlement agreement as being for "tort claims."[17] In short, under any view of the matter,

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[15]Specifically, Meyer advised Taylor that "there is no way of ascertaining *the value of the case to Ms. Winn [Davis]* other than by calculating the back pay together with prejudgment interest, since the date of her layoff" and that "[w]e have calculated the back pay and interest at approximately $110,000.00." Jt. App. 28 (emphasis added).

[16]As discussed in Taylor's initial brief on the merits, the estimate of damages which respondents submitted to TWA in 1987 calculated Davis' back pay for the period 1977-1980 at approximately $11,000 (without interest) and additional back pay for the period 1981-1984 at approximately $62,000 (without interest). Pet. Br. 31 n.15, 32 n.18; Jt. App. 31.

[17]The settlement agreement provided that Davis was to receive $23,483.75 "as and for back pay or front pay" and $23,483.75 "as and for all alleged tort claims or any other claims not represented [sic] asserted wage losses." Jt. App. 42. In addition, respondents were to receive $63,032.50 "as and for attorneys' fees and expenses. . . ." *Id.* As respondents point out in their brief, the $23,483.75 paid "as and for back pay or front pay" was paid directly to Davis (rather than to Freeland & Kronz), and Taylor is not seeking to recover that amount

(continued on next page...)

it is clear that Davis had no colorable basis for claiming the entire proceeds of the TWA lawsuit as exempt, and that the bankruptcy court acted properly in disallowing her exemption claim as to the $23,483.75 which she received in settlement of her "tort claims."

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[17](...continued from previous page)
from respondents. Resp. Br. 47 n.36. Nor is Taylor seeking to recover the amount paid for attorneys' fees. Taylor is simply seeking to recover what the bankruptcy court awarded him: the $23,483.75 paid for "tort claims," plus interest. Pet. App. 41a. Because Taylor now expects to recover approximately $11,000 from Davis as a result of a bank attachment (Resp. Br. 39 n.23), respondents may be liable for a balance of only approximately $12,000.

CONCLUSION

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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